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No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1968

DELAWARE VALLEY CONSERVATION ASSOCIATION AND 604 ADDITIONAL INDIVIDUAL PLAINTIFFS, PETITIONERS

v.

STANLEY R. RESOR, INDIVIDUALLY AND AS SECRETARY OF THE DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA, STEWART L. UDALL, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA, AND W. F. CASSIDY, INDIVIDUALLY AND AS CHIEF OF ENGINEERS OF THE DEPARTMENT OF THE ARMY OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners instituted this action to enjoin the government from proceeding with the development of the Tocks Island Reservoir Project and the Delaware Water Gap National Recreation Area. The Reservoir Project was authorized by Congress in 1962 and was

319-092—68

designed to include facilities for water conservation and supply, flood control, recreation, and hydroelectric power, at an estimated cost of $192,400,000. Section 203, Flood Control Act of 1962, 76 Stat. 1180–1182. The Recreation Area was authorized in 1965 as an integral part of the Reservoir Project. Act of September 1, 1965, 79 Stat. 612. The outlines of both projects were expressly approved by Congress in these statutes. Based upon initial appropriations, there have been some purchase negotiations, and some condemnation actions have been filed in the United States District Court for the Eastern and Middle Districts of Pennsylvania and for the District of New Jersey.[1]

On respondents' motion, the district court dismissed petitioners' action on jurisdictional grounds. 269 F. Supp. 181. In an opinion reported at 392 F. 2d 331, the Court of Appeals affirmed (Pet. App. A).

The dismissal of petitioners' complaint was clearly correct because the action constitutes an effort to enjoin the United States without its consent. See *Lar-*

[1] Petitioners are mistaken in suggesting that Congress required that acquisitions for the dam and reservoir should precede acquisitions for the Recreation Area and in stating that no funds have been made available for the dam and reservoir features and acquisitions. There is no such statutory order of priority. See Act of September 1, 1965, 79 Stat. 612–614; Department of the Interior and Related Agencies Appropriation Act, 1967, 80 Stat. 170, 173; Act of August 12, 1968, Public Law 90–479, 82 Stat. 705; Hearings, Part I, House Subcommittee of the Committee on Appropriations, *Public Works Appropriations for 1968*, 90th Cong., 1st Sess. (1967), pp. 312–319. Negotiations and announcements regarding acquisition timing and plans are directed by Sections 301 and 302, Land Acquisition Policy Act of 1960, 74 Stat. 502–503, 33 U.S.C. 596 and 597.

son v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; and *Hawaii* v. *Gordon*, 373 U.S. 57. As the courts below concluded, the relief sought by petitioners would stop the government in its tracks and interfere with the public administration. It is also clear that the officers have acted within the limits of their statutory authority and that the legislation is constitutionally valid.[2] The statutes petitioners claim have been violated are inapposite (Pet. 4–5; Pet. App. A) and petitioners admit that the federal officials have acted "within the scope of their employment" (Pet. App. B, ¶ 7).

Dismissal was also proper because petitioners do not present a justiciable case or controversy. At the time the district court passed on the complaint it was not certain how and which petitioners would be affected by the projects; the complaint was couched in terms of assumed potential invasions of property. That uncertainty remains in large measure. Those petitioners whose property has now been condemned have a remedy in the condemnation actions. *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546, 554–555; *United States* v. *Miller*, 317 U.S. 369, 373. Other petitioners whose property has not been taken (and may never be taken) are seeking premature declarations. *Ari-*

[2] *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62–64; *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 426; *Arizona* v. *California*, 283 U.S. 423, 456; *Berman* v. *Parker*, 348 U.S. 26, 33–36. Of course petitioners' meritless allegations of unconstitutional conduct were neither admitted as true nor did they require trial or leave to amend, as observed by the court of appeals. See *Land* v. *Dollar*, 330 U.S. 731, 735, note 4.

zona v. *California,* 283 U.S. 423, 463–464. If and when their lands are taken, they, too, shall have an appropriate remedy. If formal condemnation proceedings are not instituted by the government, their remedy is pursuant to the Tucker Act, 28 U.S.C. 1346(a) and 1491. Injunctive relief is thus unnecessary. *Dugan* v. *Rank,* 372 U.S. 609, 611, 619–626.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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